SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 439

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CLARK'S GAMBLE CORPORATION D/B/A CLARK'S DISCOUNT DEPARTMENT STORE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR M. N. LANDAU STORES, INC. IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (App. 13-17)[1] is reported at 407 F. 2d 199. The decision and order of the Board (App. 20-62) are reported at 168 NLRB No. 43.

JURISDICTION

The decree of the court of appeals (App. 18) was entered on February 11, 1969. The Board's petition for rehearing

[1] "App." refers to the Appendix to the petition, which appears at pp. 13-62 of the petition. "J.A." refers to the portions of the record printed as a Joint Appendix in the court below.

en banc was denied on March 26, 1969 (App. 19). On June 16, 1969, Mr. Justice Stewart granted an extension of time for filing the petition to and including August 8, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit was correct in denying enforcement of the National Labor Relations Board's bargaining order.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (161 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

STATEMENT

On December 22, 1964, Local 1262, Retail Clerks International Association, AFL-CIO,[2] claiming to represent a majority of employees at two stores owned by M. N. Landau Stores, Inc.[3] and located at Glens Falls and Saratoga Springs, New York, made a demand on the Company for recognition and bargaining (App. 26-36; J.A. 49a, 57a). That same day the Company expressed a good faith doubt in the Union's claim and suggested that the Union seek a Board election (App. 47-48; J.A. 27a). When the Union did not do so, the Company filed a petition for an election with the Board (App. 47-48; J.A. 27a). That petition was

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[2] Hereinafter referred to as the "Union".

[3] Hereinafter referred to as the "Company".

dismissed by the Board's Regional Director upon the issuance of the complaint herein on September 23, 1965 (App. 46, 48; J.A. 27a). The charge which originated this complaint had been filed by the Union on January 7, 1965 (App. 46; J.A. 26a).

After a hearing, a decision on the complaint was issued on December 30, 1966, by the Board's Trial Examiner who found that the Union's bargaining demand had been made in an inappropriate two-store unit, but who went on to consider "whether the Company committed unfair labor practices of such a nature as to render appropriate the issuance of a bargaining order" in the Glens Falls store alone (App. 48; J.A. 28a). The Trial Examiner found violations of Section 8(a)(1) which involved only six of the 77 employees in the store (App. 55, 36; J.A. 34a, 57a). He dismissed allegations of several other unfair labor practices.

The Trial Examiner then considered the proper remedy for the unfair labor practices found and concluded:

> Having found only isolated violations of Section 8(a)(1), I conclude that . . . the unfair labor practices are not sufficient to invoke the *Joy Silk* doctrine, and that a bargaining order is not called for here to remedy the 8(a)(1) violations (App. 56; J.A. 35a).

Almost one year later, on November 16, 1967, the Board issued its decision and order reversing the Trial Examiner on the allegations of Section 8(a)(1) violations in which he had found no merit (App. 22-26; J.A. 46a-49a), and ordering bargaining as a remedy for the 8(a)(1) unfair labor practices (App. 37; J.A. 58a).

The four additional unfair labor practices found by the Board included a finding that store guards, who were also city police officers, kept a Union meeting under surveillance

(App. 22-23; J.A. 46a-47a). This meeting was held in a building located only a few doors from the main intersection in Glens Falls, the location to which the police officers were routinely assigned (App. 51; J.A. 30a). The Trial Examiner had found:

> Both men testified that at the times in question they were discharging routine duties as police officers of Glens Falls, and there is no affirmative evidence that they were told to spy on the employees or that they reported to management the names of any employees attending the meeting (App. 51; J.A. 30a).

A second violation found by the Board involved a conversation between a supervisor and two strong Union supporters which the Trial Examiner characterized as "friendly" and "informal" as well as "isolated" (App. 56; J.A. 35a). The two other violations found by the Board involved only two employees. Supervisor Clark asked an employee whether she was going to run to the Union (App. 53; J.A. 32a); and Sylvia Montero, whom the Trial Examiner found was not a supervisor (App. 54; J.A. 33a), asked an employee if anyone from the Union has been around recently (App. 53; J.A. 32a).

The United States Court of Appeals for the Sixth Circuit affirmed the Board's 8(a)(1) findings as supported by substantial evidence while expressing the opinion that, "were it our function to reach an independent determination on the basis of the record it is probably that it would be at variance . . ." (App. 15). However, the court declined to enforce the Board's bargaining order because of the probability of extensive turnover during the thirty-four month hiatus between the original unfair labor practice charge and the issuance of the Board's order, and remanded the case for a determination of "the extent to which there has been a change in the identity of the employees since the time demand for recognition was made" (App. 16-17).

ARGUMENT

1. The Sixth Circuit's refusal to enforce the Board's bargaining order in the instant case was uniquely appropriate. The court observed that the turnover in retail personnel is frequent (App. 16). Enforcement of the Board's order now might impose collective bargaining on a group of employees who never authorized such representation. This would constitute a violation of the Section 7 rights of the new employees to be represented by a labor organization of their own choice or to refrain from such representation. Certainly at this late date, some five years after the organizing campaign, the effect of the unfair labor practices alleged in this case have been dissipated and a fair election, which would protect those rights, is possible.

Petitioner's reliance on *National Labor Relations Board v. Gissel Packing Co., et al.*, Nos. 573, 691, 585, O.T., 1968, decided June 16, 1969, and the cases cited therein, is misplaced. In those cases the Court's rationale was based on the possibility of an employer using dilatory tactics designed to put off indefinitely the obligation to bargain. In the instant matter however the Company, at the outset, filed a petition for an election (App. 47-48; J.A. 27a), and it was the leisurely processes of the Board which caused a three-year delay between the issuance of a complaint and the Board's decision and order. This extraordinary passage of time caused the Sixth Circuit not to deny the Board's order out of hand, but to remand the case to the Board so that it might "determine the extent to which there has been a change in the identity of the employees since the time demand for recognition was made" (App. 17). The Sixth Circuit is thus not saying that employee allegiances may have wavered, the argument considered by the court in *Gissel*, but that the identity of the entire work force may have changed.

2. In any event, the Board's bargaining order in the instant case is not appropriate:

> Under the Gissel holding a bargaining order may issue where: (a) the union had valid authorization cards from a majority of the employees in a bargaining unit; (b) the employer's unfair labor practices although not "outrageous" and "pervasive" enough to justify a bargaining order in the absence of a card majority, were still serious and extensive; (c) "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight"; and (d) employee sentiment can best be protected in the particular case by a bargaining order.

N.L.R.B. v. American Cable Systems, Inc., No. 25358, decided July 18, 1969, 71 LRRM 2979, 2984 (C.A. 5); *Food State Employees Union, Local 347 v. N.L.R.B.*, Nos. 21809 and 21921, decided July 18, 1969, 71 LRRM 3004 (C.A.D.C.). The Board's Trial Examiner decided that because of the "isolated" nature of the Section 8(a)(1) violations a bargaining order was not warranted (App. 56). The Board then reversed its Trial Examiner and issued its order because of the additional unfair labor practices found (App. 37). However, the additional violations found by the Board, aside from the alleged surveillance set forth above, involved only four employees out of 77. This can hardly be said to transform "isolated" violations into a basis for a bargaining order. None of the violations alleged were the "flagrant kind." *N.L.R.B. v. Ben Duthler, Inc.*, 395 F. 2d 28, 34 (C.A. 6). The opinion of the Sixth Circuit in *Ben Duthler* applies to the present case equally as well.

> No employees were discharged; no threats were made of moving the stores or closing the stores; and no employee was repeatedly or directly threatened by the employer or supervisory personnel. The statements of the employer and supervisory personnel that were

> found to be violations were the borderline type of statements between legitimate comment and "veiled threats", where the courts generally defer to the expertise of the Board but where the coercive effect on the employee is slight. Any lingering effect of these actions of [the employer] should be completely dissipated by the usual postings required by the Board. So in a re-run election Duthler will not benefit from any past violations.

Id. at 34.

Indeed, the Board has in many cases *refused* to issue a bargaining order where the unfair labor practices found were less innocuous and involved as few employees as the case at hand: *Union Carbide Corporation*, 166 NLRB No. 39 (extensive interrogation of employees concerning union sympathies and activities, creating the impression of surveillance, transferring a known union adherent from one job to a less desirable job, discriminatorily issuing reprimands); *Merritt Packing and Crating Service, Inc.*, 172 NLRB No. 202 (interrogation, creating the impression of surveillance, threatening employees with new requirements and restrictions, violating Section 8(a)(3) of the Act by implementing threatened restrictions); *Clermont's, Inc.*, 154 NLRB 1397 ("serious violations of 8(a)(1)" including coercive speeches, coercive statements, illegal surveillance). Furthermore, the courts have refused to enforce Board bargaining orders in circumstances, such as these, where not warranted by the severity of the unfair labor practices. "A bargaining order . . . is strong medicine." *N.L.R.B. v. Flomatic Corp.*, 347 F. 2d 74, 78 (C.A. 2); *N.L.R.B. v. Ben Duthler, Inc., supra.*

3. If the Court is of the opinion that the rationale applied by the Sixth Circuit is in conflict with *Gissel*, this matter should be remanded for reconsideration in view of the Court's opinion in *Gissel*. This would ensure proper judi-

cial review of the Board's bargaining order under the standards set by this Court. Although under Section 10(c) of the Act the Board is empowered to fashion remedial orders,

> the Board's action is not insulated from judicial review where it has applied "a remedy it has worked out on the basis of its experience, without regard to circumstances which make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act."

N.L.R.B. v. Flomatic Corp., supra at 77; citing *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 349; *Local 60, United Bhd. of Carpenters, etc. v. N.L.R.B.*, 365 U.S. 651; *Consolidated Edison Co., etc. v. N.L.R.B.*, 305 U.S. 197. A remand for reconsideration would allow the Sixth Circuit to consider the propriety of the Board's order in contemplation of *Gissel* and in light of all the surrounding circumstances.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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